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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 Jose J. Rodriguez, )  
9 )  
10 Petitioner, )  
11 v. ) CV 04-2808 PHX FJM (VAM)  
12 Deputy Warden Tucker, et al., ) ORDER  
13 Respondents. )

14 Pending before the Court is petitioner's Motion for  
15 Appointment of Counsel. (Doc. 13).

16 In a previous order, the Court noted that petitioner claims  
17 he needs counsel at least in part, due to his allegation he is  
18 mentally retarded and has an IQ of only 58. (See Doc. 13). The  
19 Court, noting that "[i]f petitioner is mentally retarded it may be  
20 necessary to appoint counsel if his habeas petition appears to  
21 have merit," ordered respondents to file a response to the motion.  
22 (Doc. 16 at pp. 2-3).

23 After being granted extensions of time, respondents filed a  
24 response on December 29, 2005, and this matter is ready for  
25 disposition. (Doc. 23).

26 **I. Law Generally**

27 Indigent prisoners seeking habeas corpus relief are not  
28 entitled to appointed counsel unless the circumstances indicate

1 that counsel is necessary to prevent due process violations.  
2 Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993); Chaney v.  
3 Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986), cert. denied, 481 U.S.  
4 1023 (1987). The Court has discretion to appoint counsel when  
5 "the interests of justice so require." 18 U.S.C. § 3006A(2)(B);  
6 see also Bonin, 999 F.2d at 428-29 (explaining counsel should be  
7 appointed in habeas cases only "when the case is so complex that  
8 due process violations will occur absent the presence of  
9 counsel"). Before appointment of counsel in a habeas proceeding  
10 will be appropriate the Court "must evaluate the likelihood of  
11 success on the merits as well as the ability of the petitioner to  
12 articulate his claims pro se in light of the complexity of the  
13 legal issues involved." Weygandt v. Look, 718 F.2d 952, 954 (9th  
14 Cir. 1983); see also Duckett v. Godinez, 67 F.3d 734, 750 (n. 8)  
15 (9th Cir. 1995).

## 16 **II. Analysis of Petitioner's Request for Counsel**

17 In his motion, petitioner contends the interests of justice  
18 require that he be appointed counsel in this matter because he is  
19 mentally retarded with an IQ of 58 "and i don't know what i am  
20 doing don't know how to write to[o] good at all i don't know why  
21 they have me here in prison ..." (Doc. 13).

22 In response, respondents oppose appointment of counsel.  
23 They concede that experts testifying on petitioner's behalf at  
24 sentencing testified his IQ was 58, but argue that, although  
25 "proof of mild mental retardation is sufficiently established ....  
26 the expanded state record now before the Court conclusively  
27 refutes the one viable claim raised in the habeas corpus petition:  
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1 trial counsel's ineffectiveness in failing to inform the court and  
2 opposing counsel of prisoner's mental retardation and I.Q. of 58."  
3 (Doc. 23 at p. 3). Respondents further contend weighing the  
4 likelihood of success and petitioner's ability to articulate his  
5 claims pro se remains the standard to evaluate whether appointment  
6 of counsel is warranted and that petitioner has not established  
7 either a likelihood of success or an inability to articulate his  
8 claims pro se. (See id. at p. 4). As a result, they argue the  
9 motion should be denied.

10 Weygandt and other cases make clear that the mere fact that  
11 petitioner's IQ is 58, without more, is not sufficient to  
12 establish entitlement to appointed counsel. Rather, petitioner  
13 must demonstrate both an inability to articulate his claims pro se  
14 and a likelihood of success on the merits of his claims. See  
15 Weygandt, 718 F.2d at 954; see also Wilborn v. Escalderon, 789  
16 F.2d 1328, 1331 (9th Cir. 1986) and Agyeman v. Corrections  
17 Corporation of America, 390 F.3d 1101, 1103 (9th Cir. 2004)  
18 (Applying this standard in motions for appointment of counsel in  
19 civil rights actions pursuant to 28 U.S.C. § 1915(d)). As noted  
20 in Wilborn, "[n]either of these factors is dispositive and both  
21 must be viewed together before reaching a decision on request of  
22 counsel ..." Wilborn, 789 F.2d at 1331.

23 Review of the facts in this case do not support appointing  
24 counsel. Petitioner's low IQ alone, absent a showing of an  
25 inability to articulate his claims pro se and a showing of a  
26 likelihood of success on the merits, does not warrant appointment  
27 of counsel. Review of his claims show that they are not complex  
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1 and petitioner has communicated them with sufficient clarity.

2 Petitioner's primary claim alleges his counsel was  
3 ineffective for not raising his mental competence as an issue  
4 during his trial (and presumably on appeal). He also alleges that  
5 counsel failed to inform him "on most of my Court proceedings."  
6 (Doc. 1 at p. 5). In addition, petitioner alleges that his  
7 conviction was obtained due to a failure by the prosecution to  
8 disclose evidence favorable to him. (Id.). Finally, Petitioner  
9 also asserts he was denied a fair trial. (Doc. 1 at p. 6).

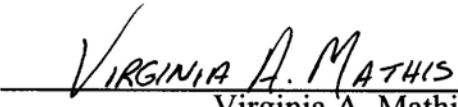
10 A preliminary review of the record does not indicate a  
11 likelihood of success on the merits of any of these claims. Other  
12 than make assertions petitioner provides no convincing evidence.  
13 Moreover, petitioner did not properly exhaust any of his habeas  
14 claims in state court. None of the claims were raised on direct  
15 appeal. No copy of petitioner's pro se brief to the state trial  
16 court in support of his petition for post-conviction relief was  
17 included in the habeas record. (See Doc. 19 at Exhibit R),  
18 Respondents state petitioner raised a claim in the Rule 32  
19 alleging "his low intelligence interfered with his ability to  
20 assist appellate counsel." (Doc. 19 at p. 4). However, that  
21 issue is different than the claim raised in the habeas petition  
22 and petitioner never sought review of the trial court's denial of  
23 post-conviction relief in either the Arizona Court of Appeals or  
24 Arizona Supreme Court. (See Doc. 1 at pp. 3 and 5; Doc. 19 at p.  
25 4).

26 If petitioner believes his mental competency (or lack  
27 thereof) prevented him from properly raising and/or exhausting any  
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1 of his habeas claims in state court, this may be grounds for  
2 returning to state court, seeking appointment of counsel to  
3 present these claims, and presenting these claims, including, most  
4 particularly, any claims based on his lack of competency to stand  
5 trial, in a new post-conviction relief petition. See  
6 Ariz.R.Crim.P. 32.1(e) and (f); 32.4(a) (providing exceptions for  
7 filing a second or successive petition for post-conviction  
8 relief). In any event, petitioner must first exhaust his habeas  
9 claims in state court. His failure to do so means he has no  
10 chance of prevailing on such claims when raised for the first time  
11 in a federal habeas corpus petition. For these reasons,  
12 appointment of counsel in this matter is unwarranted and will not  
13 serve the interests of justice.

14 **IT IS THEREFORE ORDERED** that petitioner's Motion for  
15 Appointment of Counsel (Doc. 13) is denied without prejudice.

16 DATED this 25th day of January, 2006.

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19 Virginia A. Mathis  
United States Magistrate Judge  
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